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IN THE

Supreme Court of the United States

October Term, 1933

No. [redacted] . 11

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner (Complainant-Appellee-Appellant Below),

against

MAXIME H. FURLAUD and KINGSTON CORPORATION,
Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,
Defendants-Appellees Below,

and

CARLOS REUTER,
Defendant Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

RALPH ROYALL,
WILLIAM A. MAGEE, and
CLARK MILLER,
Of Counsel.

INDEX

	PETITION
STATEMENT	2
THE QUESTIONS PRESENTED	9
REASONS FOR ALLOWANCE OF THE WRIT	10
THE IMPORTANCE OF THE QUESTIONS	12

	BRIEF
OPINIONS OF THE COURTS BELOW	1
JURISDICTION	1
STATEMENT OF FACTS	1
SPECIFICATION OF ERRORS	1
ARGUMENT	2
CONCLUSION	12

AUTHORITIES CITED

	PETITION	BRIEF
Alivon v. *Furnival*, 1 Cr., M. & R. 277		10
Bagby et al. v. *Atlantic, Miss. & Ohio R. R.*, 86 Pa. 291		10
Ball v. *Breed*, 294 Fed. 227, C. C. A. 2d Cir. (1923)	14	11
Bank v. *McLeod*, 38 Ohio St. 174		10
Bernheimer v. *Converse*, 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. 755 (1907)	11	8, 9, 10

	PETITION	BRIEF
Bluefields S. S. Co. v. *Steele,* 184 Fed. 584, C. C. A. 3rd Cir. (1911)	11, 12	2, 3
Booth v. *Clark,* 17 How. 322, 58 U. S. 322, 15 L. Ed. 164 (1855)	7, 10 11, 12	4, 8, 9, 10, 11, 12
Boulware v. *Davis,* 90 Ala. 207		9
Castleman v. *Templeman,* 87 Md. 546		9
Cole v. *Sassenbeery,* 230 Nev. 22		10
Converse v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, 32 S. C. 415 (1911)		9
Grant v. *Leach & Co.,* 280 U. S. 351, 74 L. Ed. 470, 50 S. C. 107 (1930)	11	9
Greene v. *Star Cash & Package Car. Co.,* 99 Fed. 656, Cir. Ct. D. Conn. (1900)		7
Hardee v. *Wilson,* 129 Tenn. 511 ...		10
Hunt v. *Columbian Ins. Co.,* 55 Me. 290		9
Hurd v. *City of Elizabeth,* 41 N. J. L., 1		10
Mabon v. *Ongley Electric Co.,* 156 N. Y. 196.....		9
McKee v. *Lamon,* 159 U. S. 317, 40 L. Ed. 165, 16 S. C. 11 (1895) ...	5	
Mercantile Trust Co. v. *Kanawha & O. Ry. Co.,* 39 Fed. 337, Cir. Ct. D. W. Va. (1889).....		6, 7
Metzner v. *Bauer,* 98 Ind. 425.....		9

	PETITION	BRIEF
Old Dominion Copper Company v. *Lewisohn,* 210 U. S. 206, 52 L. Ed. 1025, 28 S. C. 634 (1908)	5, 6, 12, 14	11, 12
Parker v. *Stoughton Mill Co.,* 91 Wis. 174		10
Perfection Tire, etc. Co. v. *George Tire Serv. Co.,* 5 Pa. Dist. & Co. 744		9
Platt v. *Philadelphia & R. R. Co.,* 54 Fed. 569, Cir. Ct. D. Mass (1893)	12	7
Rust v. *United Waterworks Co.,* 70 Fed. 129, C. C. A. 8th (1895)	11	2
Sercomb v. *Catlin,* 128 Ill. 556		9
Solis v. *Blank,* 199 Pa. 600		10
State v. *U. S. Fidelity, etc. Co.,* 81 W. Va. 184		10
Stevens v. *Tilden,* 122 Minn. 250		9
Union Guardian Trust Co. v. *Broadway National Bank,* 138 Misc. 16		9
Van Kempen v. *Latham,* 195 N. C. 389		10
Walker v. *United States Light & Heating Co.,* 220 Fed. 393, Dis. Ct. S. D. N. Y. (1915)		2, 3, 4
Clark on Receivers, 2d Ed. (1929)	12	

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No. .

GEORGE W. MCCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner (Complainant-Appellee-Appellant Below),

against

MAXIME H. FURLAUD and KINGSTON CORPORATION,
Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,
Defendants-Appellees Below,

and

CARLOS REUTER,
Defendant Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Charles E. Hughes, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

George W. McCandless, as Receiver of Duquesne Gas Corporation, complainant-appellee-appellant below,

the above named petitioner, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, filed on the 8th day of January, 1934, reversing the final decree filed in the United States District Court for the Southern District of New York on the 11th day of May, 1933, which awarded a judgment to complainant against the defendants Maxime H. Furlaud and Kingston Corporation in the sum of $1,834,640.08.

Statement

This is a suit brought by the petitioner as complainant in his capacity as ancillary receiver of Duquesne Gas Corporation, appointed as such in the District Court of the United States for the Southern District of New York (R. 5-7). After a trial before United States District Court Judge Knox, a decree was made awarding judgment to the complainant against the defendants Maxime H. Furlaud and the Kingston Corporation in the sum of $1,834,640.08 and dismissing the complaint as to the defendants Byron Corporation and Chaucer Corporation (R. 339-40). The defendant Carlos Reuter was not served with process and did not appear (R. 1).

The defendants Maxime H. Furlaud and Kingston Corporation appealed from such decree to the Circuit Court of Appeals, Second Circuit, and the complainant took a cross appeal claiming that judgment should be awarded against each of the defendants Byron Corporation and Chaucer Corporation in the sum of $425,000 with interest, and also that the judgment against the

defendants Maxime H. Furlaud and Kingston Corporation should be increased by the amount of $850,000 with interest.

Upon the appeal the defendants Maxime H. Furlaud and Kingston Corporation raised for the first time the question of the complainant's title to sue. The claim of these defendants was that the appointment of the complainant (this petitioner) as ancillary receiver in the District Court for the Southern District of New York was void and that such appointment could be collaterally attacked and that the judgment which had been granted in favor of the complainant as such ancillary receiver should be vacated and set aside. The Circuit Court of Appeals adopted this view and its decree dated the 8th day of January, 1934, which this petitioner now seeks to have reviewed, reversed the judgment. The Circuit Court of Appeals refrained from deciding the merits.

The subject matter of the suit is the promoting in 1930 by the defendants Maxime H. Furlaud and Carlos Reuter of the Duquesne Gas Corporation, of which the complainant is the receiver, and the public issue by them of $4,000,000 of bonds and $1,000,000 of notes of said corporation and the sale by them of a part of the stock of said corporation for $850,000.

The facts as found by the District Judge and which are undisputed are, very briefly stated, that, acting through an incorporated banking house, known as Furlaud & Company (R. 318) (later known as Furlaud, Reuter & Company and still later known as Winchelsea Holding Corporation and which corporation was dissolved before the commencement of this suit (R. 333, 155-6)), the defendants Furlaud and Reuter caused

their banking house to publicly circulate banking circulars covering the issue of such bonds and notes, which circulars stated in effect that the proceeds of the issue of these bonds and notes would be used for the purchase of the properties of Duquesne Gas Corporation and for the other corporate purposes of that corporation (R. 326, 263-71, 276-84).

As the District Court also found, and as was also undisputed, the defendants procured fraudulent and highly excessive appraisals of the natural gas properties which the Duquesne Gas Corporation was organized to acquire and operate (R. 319-20, 325-6). It was the use of these fraudulent appraisals which made it feasible for the defendants to consummate their fraud upon the Duquesne Gas Corporation and its creditors as well as upon the public who subscribed to the bonds and notes.

It was also found by the District Court that these properties, which cost less than one-third of the amount of the fraudulent appraisals, were paid for out of the proceeds of the bonds and notes, out of the proceeds of which also came the $365,000 of working capital which, together with the gas properties, was all that the corporation ever received out of the proceeds of the bonds and notes or for its stock (R. 325-6, 121).

As a result of the issuance of these circulars, these defendants through their banking house received $4,492,-768.73 from the sale of the bonds and notes, of which they turned over to the Duquesne Gas Corporation or used for its benefit only the sum of $2,937,989.90. They misappropriated and converted to their own use the difference, viz. $1,554,788.83 (R. 325). This sum, with

interest computed upon it to the time of the judgment, amounted to the sum of $1,834,640.08, which is the amount of the judgment granted (R. 339).

The corporation was by the fraudulent acts of the defendants rendered insolvent at its start and, as was inevitable, receivership soon occurred.

The District Court properly held that under the doctrine of this Court's decision in the case of *McKee* v. *Lamon*, 159 U. S. 317, 40 L. Ed. 165, 16 S. C. 11 (1895) a trust arose in favor of Duquesne Gas Corporation from the fact that the moneys subscribed for the bonds and notes were placed in the hands of the banking house of the defendants to be paid over or used to or for the benefit of Duquesne Gas Corporation (R. 329-31), and that this trust could be enforced by the receiver of such corporation. The District Court also properly held that these fraudulent promoters did not have immunity from accountability for this breach of trust under the doctrine of the decision of *Old Dominion Copper Company* v. *Lewisohn*, 210 U. S. 206, 52 L. Ed. 1025, 28 S. C. 634 (1908).

The District Court, however, held that the situation as to accountability by Furlaud and Reuter for the stock of the corporation was different. These defendants had all of the issued stock of the corporation, viz. 675,000 shares, gratuitously issued to themselves in the name of a dummy, and then had the stock listed upon the New York Curb Exchange and sold 85,000 shares of it, through the agency of defendants Byron Corporation and Chaucer Corporation, to a Curb Exchange operator for the sum of $850,000 cash (R. 336).

These last mentioned corporations and the defendant Kingston Corporation were dummies used by the individual defendants in perpetrating the fraud.

The District Court held, erroneously we believe, that under the doctrine of this Court's decision in the *Old Dominion* case, the fraudulent promoters had immunity from accountability for the $850,000 received by them as the proceeds from the sale of a part of the stock (R. 336).

While clearly there is a real legal distinction between the different situations presented in respect of the defendants' accountability, we believe, nevertheless, that this Court's decision in the *Old Dominion* case does not give immunity from accountability to these fraudulent promoters for the $850,000 proceeds of a part of the stock.

The facts of the case which are thus very briefly summarized are more fully stated in the opinion of United States District Judge Knox which is printed at pages 318-37 of the Record and reported in 4 Fed. Supp. 884 (advance sheets only).

As above indicated, the opinion of the Circuit Court of Appeals refrained from dealing with the merits and based its reversal of the judgment wholly upon the proposition that the appointment of the petitioner as ancillary receiver in the Southern District of New York was void.

The sole reason for this determination was that the appointment of the petitioner as ancillary receiver was made in the United States District Court for the Southern District of New York upon the petition of the petitioner herein made by him as the primary receiver, acting under his appointment as such in the United States Dis-

trict Court for the Western District of Pennsylvania, rather than upon a separate ancillary bill by a creditor of the corporation against the corporation in the United States District Court for the Southern District of New York.

The petitioner was duly appointed as primary or domiciliary receiver of Duquesne Gas Corporation in the District Court of the Western District of Pennsylvania, in which the Duquesne Gas Corporation was domiciled and within the confines of which all of its tangible property was situated. Such receivership was granted in two suits: one a suit by a stockholder brought in the United States District Court for the Western District of Pennsylvania, and the other a suit brought in that Court by the trustee under the mortgage securing the bonds. These suits were consolidated and *the corporation then appeared and consented to a decree for the appointment of a receiver.* The petitioner was thereupon appointed such receiver and duly qualified and has ever since been acting as such (R. 183-234). The validity or propriety of the primary receivership proceedings has not been questioned.

As the defendants who would have to be sued were to be found in New York rather than in the Western District of Pennsylvania, it was necessary under the doctrine established by the decision of this Court in the case of *Booth* v. *Clark,* 17 How. 322, 58 U. S. 322, 15 L. Ed. 164 (1855) that the petitioner be appointed ancillary receiver in the Southern District of New York in order there to maintain the suit. Therefore, the petitioner filed

his petition in the Southern District of New York setting forth his appointment as primary receiver and attaching thereto exemplified copies of the proceedings in the United States District Court of the Western District of Pennsylvania relating to his appointment as primary receiver and asking for the appointment of an ancillary receiver. The petition alleged the existence of the cause of action against the New York defendants.

The order of the District Court of the Southern District of New York appointing the petitioner ancillary receiver, dated March 23, 1932, is printed at pages 232-234 of the Record. It recites that it is made,

> "Upon the annexed bill of complaint filed in the above entitled suit in the United States District Court for the Western District of Pennsylvania, and upon the answer of the defendant therein to said amended bill of complaint, *and upon the per curiam decree therein of the United States District Court for the Western District of Pennsylvania, dated the 19th day of January, 1932, appointing George W. McCandless receiver of the assets*, lands, tenements and hereditaments of the defendant Duquesne Gas Corporation, and all of its property real and personal, *including choses in action*, and upon the certificates of the Clerk of the United States District Court for the Western District of Pennsylvania of the filing and the approving of the bond of said receiver, and upon reading and filing the petition of said George W. McCandless, duly verified the 23rd day of March, 1932, from which it appears to the satisfaction of the Court that there is need of an ancillary receivership in this district."

and provides that it is

> "ORDERED, ADJUDGED AND DECREED that George W. McCandless be and he hereby is appointed ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York to carry into force and effect the order of the Court of original jurisdiction.

This order authorized the beginning of this suit and provided (R. 234) for a bond of $25,000 "and that upon any moneys or funds coming into his hands said ancillary receiver shall immediately report the fact to the Court and submit to the Court the question of an increase of this bond."

The record does not disclose the existence of any tangible property of Duquesne Gas Corporation within the Southern District of New York, nor is the existence of any such property known. The case was submitted for decision in the Circuit Court of Appeals upon the statement made in open Court by counsel that there was no tangible property within the Southern District of New York. The property in the Southern District of New York is confined to the intangible property, consisting of the chose in action upon which the petitioner brought this suit.

The Questions Presented

(1) Was not the appointment by the United States District Court for the Southern District of New York by the order of that Court entered on the 23rd day of March, 1932 of the petitioner as ancillary receiver in the

Southern District of New York of Duquesne Gas Corporation valid?

(2) Did not the petitioner have, as such ancillary receiver, good right and title to maintain this suit?

(3) Did not the petitioner in his capacity as primary receiver have good right and title to maintain this suit?

(4) Should not the final decree entered in the United States District Court, dated May 11, 1933, awarding to the petitioner a judgment of $1,834,640.08 against the defendants Maxime H. Furlaud and Kingston Corporation be reinstated and modified by increasing the amount thereof by the sum of $850,000 with interest, and by awarding judgment also as against each of the defendants Byron Corporation and Chaucer Corporation in the sum of $425,000 and interest.

Reasons for the Allowance of the Writ

(1) The decision of the Circuit Court of Appeals is clearly erroneous. The appointment of an ancillary receiver upon the petition of the primary receiver for the mere purpose of bringing a suit in a jurisdiction foreign to that of the primary appointment does not, as stated by the Circuit Court of Appeals, violate the rule of *Booth* v. *Clark,* or the reason for that rule. The reason for the rule in *Booth* v. *Clark* for not permitting a receiver by comity to sue outside of the jurisdiction of the Court appointing him is that it might result in removing assets from a foreign jurisdiction to the place of the receiver

against the interest of the creditors who are residents of the foreign jurisdiction. Manifestly, the foreign creditors are as well protected whether the ancillary receiver's appointment is made upon the petition of the primary receiver or upon a separate creditor's bill.

(2) The opposite decision of the question has been arrived at or at least strongly indicated by the decision of the Circuit Court of Appeals in the Eighth Circuit in the case of *Rust* v. *United Water Works,* 70 Fed. 129. The opposite decision of the question, is also clearly indicated in the Third Circuit in the decision of the Circuit Court of Appeals of that Circuit in the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584.

(3) This Court has in its decision in the case of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. 755 (1907), greatly limited its decision in the case of *Booth* v. *Clark* which later decision is completely inconsistent with the Court's former decision so far as the reason for the doctrine is concerned, viz. the protection of foreign creditors. This Court has ingrafted further limitation upon the doctrine of *Booth* v. *Clark* in the case of *Grant* v. *Leach & Co.,* 280 U. S. 351, 74 L. Ed. 470, 50 S. C. 107 (1930).

The Courts of several of the States refuse to adopt the doctrine of *Booth* v. *Clark* and hold that the ordinary type of receiver in equity appointed by a Court in a foreign jurisdiction will by comity be permitted to sue in their Courts, while the Courts of the other States, although adopting and applying the general doctrine of *Booth* v. *Clark,* have ingrafted many exceptions upon it.

The question seriously arises whether the doctrine of *Booth* v. *Clark* any longer serves a useful purpose and whether the time has not come when it should be completely abandoned by this Court.

(4) The District Court had a mistaken conception that, under the doctrine of this Court's decision in the case of *Old Dominion* v. *Lewisohn, supra,* the defendants had to be granted immunity from accountability for their fraudulent acts in misappropriating the capital stock of Duquesne Gas Corporation and the $850,000 received by them from the sale of a part of it.

Importance of the Questions

It is most important that this Court review the decision of the Circuit Court of Appeals condemning the procedure upon the appointment of the ancillary receiver and holding that appointments so obtained are void for the following chief reasons.

It has long been a common practice to bring about the appointment of ancillary receivers upon the petition of the primary receiver. This is shown by the statement of Circuit Judge Putnam in the case of *Platt* v. *Philadelphia & R. R. Co.,* 54 Fed. 569 (1893).

The fact that it is a common practice is also indicated by *Clark on Receivers,* Second Edition, 1929, which is one of the most recent and thorough discussions upon the subject. At page 434 the author suggests that an application by the petition of the domiciliary receiver is proper and cites the *Bluefields* case *supra.* It is also to

be noted that in the forms compiled in his book of forms, with respect to the appointment of ancillary receivers, the only form is a form of petition by the domiciliary receiver (Form No. 28, page 1646).

If, therefore, the decision of the Circuit Court of Appeals is to stand, it would mean that all such appointments are void and subject to collateral attack, and that all suits which have heretofore been maintained by ancillary receivers thus appointed are subject to be reopened and raked over, and that all titles to properties acquired through ancillary receivers thus appointed are subject to attack, at least within the area of the Second Circuit,—and the same result would follow also in respect to such matters within the area of any of the Circuits, the Courts of which might see fit to follow the decision of the Circuit Court of Appeals in this suit.

The procedure by way of separate ancillary bill is more cumbersome and expensive than by petition of the primary receiver. As shown in our brief hereto annexed there is no reason in the light of proper judicial procedure or from regard to due process or otherwise against the more simple procedure by way of petition of the primary receiver. This form of procedure, as we will also show in our brief hereto annexed, is more in accord with the realities than the other more cumbersome form of procedure. *Furthermore, as shown by the brief hereto annexed, if the views of the Circuit Court of Appeals are to prevail there would be no method of procuring the appointment of an ancillary receiver in this and many other instances where the ends of justice require such appointment.*

As to the merits of the case. Promoters and bankers have been finding immunity in the Courts from accountability in respect to fraudulent promotions arising out of the application by the Courts of the decision of this Court in the case of *Old Dominion Copper Company* v. *Lewisohn, supra,* to situations to which we believe this Court did not intend its decision in the *Old Dominion* case to apply. An example of such a decision is *Ball* v. *Breed,* 294 Fed. 227, (C. C. A. 2d Circuit 1923).

As a further example of this tendency, the District Judge indicated during the course of the oral argument which took place at the close of the trial that, although his sense of justice was shocked by the facts of the case, he might nevertheless be constrained by the *Old Dominion* case and the *Ball* v. *Breed* case and the similar decisions to decide for the defendants; and as indicated by the opinion rendered by the District Judge, he finally felt constrained by the *Old Dominion* decision to refuse judgment for accountability for the $850,000 of moneys which were misappropriated out of the proceeds of the stock (R. p. 336).

It is important, therefore, that this Court should write further upon the subject in order to clarify and to limit the application of the doctrine of the *Old Dominion* case.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals of the Second Circuit, dated the 8th day of January, 1934, and the decree of the United States District Court for the Southern District

of New York, dated the 11th day of May, 1933, should be granted.

GEORGE W. MCCANDLESS,
As Receiver of Duquesne Gas Corporation.

By RALPH ROYALL,
WILLIAM A. MAGEE, and
CLARK MILLER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion of the District Court is reported in 4 Fed. Supp. 884 (advance sheets only), and is printed at pages 318-37 of the Record. The opinion of the Circuit Court of Appeals is not yet reported. Printed copies of the opinion of the Circuit Court of Appeals are filed herewith.

Jurisdiction

The jurisdiction to issue the writ is found in Section 240a of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Sec. 347a of Title 28, U. S. C.

Statement of Facts

The statement of facts set out in the foregoing petition is here adopted.

Specification of Errors

(1) The Circuit Court of Appeals erred in reversing the decree of the District Court, dated the 11th day of May, 1933, and in holding that the appointment of the petitioner as ancillary receiver was void and that he did not acquire in any of the proceedings a status to warrant the institution of this suit.

(2) The Circuit Court of Appeals erred in reversing the decree of the District Court dated the 11th day of May, 1933 and in failing to modify the decree by adding to the amount of the judgment the sum of $850,000 with interest and directing that judgment be entered also against defendants Byron Corporation and Chaucer Corporation in the sum of $850,000 with interest.

Argument

I

It was held in the case of *Rust* v. *United Waterworks Co.,* 70 Fed. 129 C. C. A. 8th (1895), that it is proper for a Federal Court to permit a receiver in equity on his own petition to be appointed as ancillary receiver in order to apear in and protect the rights of the receivership estate in a suit pending in a Court of another District or Circuit.

It was held in the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584, C. C. A. 3rd (1911), that, where the procedure adopted is the filing by a creditor of a separate bill for the appointment of an ancillary receiver in a jurisdiction foreign to the primary appointment, no *subpoena ad respondendum* is necessary,—that the new bill is to be deemed ancillary to the original bill in every sense,—that the parties having been brought before the primary court are deemed to be before the other court for that purpose.

It was held in the case of *Walker* v. *United States Light & Heating Company,* 220 Fed. 393, D. C. S. D., N. Y. (1915), that, in a case where the proceeding for

the ancillary appointment was taken by an ancillary bill, the corporation (the defendant in receivership) could not go behind the consent that it had given to the making of the primary receivership and be heard to resist the appointment of the ancillary receiver.

Who has any direct interest in the propriety of an order appointing an ancillary receiver? The answer is obvious: (1) the corporation, (2) the local creditors within the ancillary jurisdiction, and (3) in an important, though different, sense the primary receiver.

As to the corporation (the defendant in the primary suit whose assets have been taken out of its control and sequestered in the hands of the Court), it is the party chiefly concerned. But as shown by the *Bluefields* case, it, by virtue of its being a party before the Court in the primary proceedings, is deemed to be before the Court in the ancillary proceedings, and, as shown by the decision in the *Walker* case, having consented in the primary proceeding, it is powerless to do anything but acquiesce in the ancillary proceeding.

What conception of the proper exercise of judicial power or of jurisdiction to act is then violated by the appointment of the ancillary receiver upon the petition of the primary one? What purpose would be served, excepting a slavish adherence to a meaningless legal formula, in requiring a creditor to file a new bill against the corporation in the ancillary jurisdiction? Even if judicial process against the corporation for such purpose were required to be served upon the corporation anew,—which under the decision of the *Bluefields* case, it is not,—the Court of the primary jurisdiction, which has the

corporation before it could no doubt, if it saw fit, direct it to appear in that suit for the purpose of thus conforming to an idle formula, or perhaps even to direct it not only to appear but to formally consent to the appointment of the ancillary receiver if that consent were required,—which the decision in the *Walker* case shows that it is not.

Where an awkward form of judicial procedure thus appears to have nothing of substance in it and to consist merely of a hollow formula, there is no underlying judicial conception of power or of jurisdiction which requires it to be followed. This being so, the simple straightforward procedure of petition by the primary receiver is to be preferred.

The only other judicial concern with the appointment of the ancillary receiver and the only thing, indeed, which makes the appointment of an ancillary receiver necessary is the restricted rule of comity set down in the *Booth* case which does not permit the primary receiver to maintain a suit or take possession of the assets of the corporation in the foreign jurisdiction, and this for the reason that the creditors who are citizens of that foreign jurisdiction should have their interests protected in the assets of the corporation within such foreign jurisdiction. But clearly, if the receiver comes before the Court in the foreign jurisdiction and seeks an appointment as ancillary receiver from such Court and is appointed by that Court and put under bond by that Court and made amenable to the further orders of that Court, he is as much the receiver of that Court,—the creditors of that jurisdiction have as much redress against him out of the assets which he may

receive as such ancillary receiver,—as though he were appointed under an ancillary bill instead of by a petition. It is clear, therefore, that such form of procedure is wholly consistent with the rule restricting comity for the purpose of protecting the creditors foreign to the primary jurisdiction.

As to the third party who has an interest in the ancillary proceeding, viz., the primary receiver, the procedure which was adopted here of having it made upon his petition recognizes that interest. The procedure by way of a separate bill of a creditor against the corporation is a form of procedure which fails to take the interest of the primary receiver into consideration. While it is true that the primary receiver has no direct interest of his own in the subject matter, such as the interest of the corporation or the interest of its creditors, nevertheless he is the officer of the Court having the primary jurisdiction of the subject matter to whom the assets of the corporation have been committed and is charged with the duty of administering them. It is a well established rule of procedure that the ancillary jurisdictions look to the primary jurisdiction for the orders and decrees leading to the final fixing of the rights of the interested parties and for sale and distribution, etc. The ancillary courts conform so far as they can, consistently with the protection of local creditors, with the dispositions and determinations made by the Court of primary jurisdiction. This being so, it goes without saying that he who is acting as the chief officer of the Court primarily concerned, viz., the primary receiver, is one who properly should be before the Court in any proceeding for the appointment of an ancillary receiver.

In the last analysis the primary receiver, having regard to the realities, is, indeed, the only person who needs to be heard upon such an application in the ordinary conservation consent receivership. In truth the procedure in the form of another independent suit with a creditor as complainant and the corporation as defendant disregards the one whom the Court is chiefly interested in hearing,—the primary receiver. Of course no Court in the normal situation would think of going forward with the appointment of an ancillary receiver without being well assured that the step had the cognizance of the primary receiver and the Courts usually appoint the primary receiver as ancillary receiver. This goes to show that the proceeding by way of petition by the primary receiver is more in accord with the realities than the procedure by way of another creditors bill.

It is no doubt for the various reasons above set out that such procedure has come to be so broadly adopted.

Cases are cited by the Circuit Court of Appeals to support its conclusion that the appointment of a receiver may be made only upon a separate ancillary bill and may not be made upon a petition by the primary receiver. These cases do not so hold.

The case of *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 39 Fed. 337, clearly does not decide the question of the validity of an appointment of an ancillary receiver upon the petition of the primary receiver. That case dealt with the question of how an *ex parte* application of the complainant in the original railway foreclosure bill made in another Court should be disposed of. The other cases referred to by the Court below apply this

case to various situations, some of them in rather a distorted manner. The only case cited that deals with a situation arising from the appointment of an ancillary receiver upon the petition of the primary receiver is the case of *Greene* v. *Star Cash & Package Car. Co.,* 99 Fed. 656. But it is clear that the Court based its decision vacating the appointment which it had just made of an ancillary receiver upon the ground that it had been made to appear that the interests of the corporation had not been properly protected upon the primary receivership proceedings. The authority of the *Kanawha* case as applicable to situations such as the one presented by the instant case was directly questioned in the case of *Platt* v. *Philadelphia & R. R Co.,* 54 Fed. 569 (1893).

The opinion of the Circuit Court of Appeals states:

> "*Even if there are assets in the foreign jurisdiction,* the Court there has a right to appoint a receiver only in a pending suit where independent relief is asked." (Italics ours.)

During the course of the argument, one of the Judges of the Circuit Court of Appeals stated that, there being no tangible assets within the Southern District of New York, he did not see how the appointment of an ancillary receiver could be brought about by any form of proceeding. If this is the correct view, it would manifestly follow that a receiver situated as is this petitioner would have no possibility of beginning or prosecuting a suit to hold these fraudulent promoters accountable, unless, by chance, he could find them within the jurisdiction of the Western District of Pennsylvania.

II

The opinion of the Circuit Court of Appeals refers to *Booth* v. *Clark,* 17 How. 322, 15 L. ed. 164 (1855), and several other decisions following it and then states that the procedure here adopted "improperly avoids the rule denying foreign receivers the right to sue in the foreign jurisdiction."

Booth v. *Clark,* which is the basis of the rule that a foreign receiver may not sue beyond the confines of the Court from which he received his appointment, comes to this: That while a Court might, as do the English Courts, extend by comity the right to sue to a receiver appointed in a foreign Court, our Courts should not do so, and this for the reason that the rights of local creditors might be prejudiced by the collection and removal of local assets by such receiver.

This Court has since greatly restricted the scope of this decision. It has quite departed from the decision so far as the reason for it is concerned.

In the case of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. ed. 1163 27 S. C. 755 (1906), the Court held that a state statutory receiver, which it characterized as a "quasi-assignee" of the corporation, could as such sue beyond the jurisdiction of the receiver's appointment. Manifestly, the position of the local creditors would be prejudiced to the same extent whether the assets are removed by a receiver who can be characterized as a "quasi-assignee" or by a mere equity receiver. This broad exception has been frequently applied to quite a variety of cases.

Another exception was ingrafted by this Court by its decision in *Grant* v. *Leach & Co.*, 280 U. S. 351, 74 L. ed. 470 50 S. C. 107 (1930), in which this Court permitted an equity receiver appointed by one of the Federal District Courts to sue in another Federal District Court located, however, within the same State, stating at page 362 that "the Federal Court in the same State cannot rightly be considered a court of foreign jurisdiction within the meaning of the general rule."

The case of *Converse* v. *Hamilton*, 224 U. S. 243, 56 L. ed. 749 32 S. C. 415 (1911), carries the limitation made by *Bernheimer* v. *Converse* to the point that the denial by the Courts of one State of the right of suit by a receiver appointed by the Courts of a sister State (which latter Courts have determined that such a receiver stands in the position of an assignee) is a violation of the full faith and credit clause of the Constitution.

The Courts of several States have seen fit not to follow the rule of *Booth* v. *Clark*, but have determined, notwithstanding that decision, to extend comity to foreign equity receivers for the purpose of suing within their States.*

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*New York—*Mabon* v. *Ongley Electric Co.*, 156 N. Y. 196; *Union Guardian Trust Co.* v. *Broadway National Bank*, 138 Misc. 16.

The Court in the last cited case referred to the following decisions of other states which grant by comity the right to foreign equity receivers to sue:

Ala.— *Boulware* v. *Davis*, 90 Ala. 207;
Ill.— *Sercomb* v. *Catlin*, 128 Ill. 556;
Ind.— *Metzner* v. *Bauer*, 98 Ind. 425;
Me.— *Hunt* v. *Columbian Ins. Co.*, 55 Me. 290;
Md.— *Castleman* v. *Templeman*, 87 Md. 546;
Minn.— *Stevens* v. *Tilden*, 122 Minn. 250;

Most of the other States, while following the general rule of *Booth* v. *Clark*, have applied the limitations suggested by the *Bernheimer* decision.

In 1855, when the decision in *Booth* v. *Clark* was made, the question as to the policy then suitable was quite a different one than is presented by the modern day relations existing between our various States. The question of whether the Federal Courts should as a matter of comity recognize a receiver appointed by a Court in another State or by a Federal Court in another District is purely a question of policy as distinguished from a question of power, jurisdiction or constitutional rights. It is far from clear that this question of policy should now be viewed in the same light as it was in 1854. When consideration has also been given to the facts that this Court has by its decision in the case of *Bernheimer* v. *Converse* largely emasculated the rule and completely departed from it so far as the reason for it is concerned and that many of the states have departed from the federal view as to this question of policy, the question arises whether the time has not now come to look upon the rule as obsolete and for this Court so to declare.

N. J.— *Hurd* v. *City of Elizabeth*, 41 N. J. L. 1;
Ohio— *Bank* v. *McLeod*, 38 Ohio St. 174;
Tenn.— *Hardee* v. *Wilson*, 129 Tenn. 511;
Wisc.— *Parker* v. *Stoughton Mill Co.*, 91 Wisc. 174;
England—*Alivon* v. *Furnival*, 1 Cr., M. & R. 277.

The Courts of the following other states adopt the same view:

N. C.— *Van Kempen* v. *Latham*, 195 N. C. 389;
Pa.— *Bagby et al.* v. *Atlantic, Mississippi & Ohio R. R.*, 86 Pa. 291;
Solis v. *Blank*, 199 Pa. 600.
S. D.— *Cole* v. *Sassenbeery*, 230 Nev. 22;
W. Va.—*State* v. *U. S. Fidelity, etc. Co.*, 81 W. Va. 184.

However that may be, the procedure here adopted for the appointment of the ancillary receiver does not, as the Circuit Court of Appeals says, avoid the rule. On the contrary, the procedure was adopted in recognition of the rule and in full compliance with it. It was for this that this petitioner applied for and obtained his ancillary appointment and furnished bond for the protection of local creditors.

III

The Circuit Court of Appeals, after setting forth a brief statement of the facts, rather indicates again a leaning such as their decision in the case of *Ball* v. *Breed,* indicates, for the Court goes on and says:

> "Whether this was a misappropriation of the funds *or a legitimate profit* we need not now decide." (Italics ours.)

There is no need to do more than refer the Court to the facts as carefully summarized in Judge Knox's opinion to present a complete demonstration that there is here presented a shocking case of fraudulent misappropriation.

It is an unfortunate thing that the doctrine of the *Old Dominion* case should be interpreted as having the effect of legitimatizing transactions which from the standpoint of plain justice and good morals are so shockingly wrong.

Conclusion

It is submitted that it is most important that this Court should decide and set at rest the question as to the validity of appointments of ancillary receivers for the purpose of bringing suit in cases where such appointments are brought about upon the petition of a primary receiver, and for the Court also to give consideration to the wisdom of continuing a rule of policy laid down in *Booth* v. *Clark* under which comity has been denied to equity receivers to sue in a jurisdiction beyond that of their appointment.

It is also submitted that it is most important that the Court review the application of its decision of *Old Dominion Copper Company* v. *Lewisohn* in respect of situations such as the instant one in which fraudulent promoters or bankers claim,—under what is a supposedly correct construction of that case,—immunity from accountability for fraudulent misappropriations.

Respectfully submitted,

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